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 7 GATEWAY TITLE COMPANY

8 IN THE UNITED STATES DISTRICT COURT  
 9  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11  
 12 SAN FRANCISCO DIVISION

13 AUDREY McNAMARA NEVIS, ) Case No. C 07 2568  
 14 Plaintiff, )  
 15 v. )  
 16 WELLS FARGO BANK, a California )  
 17 corporation, EXECUTIVE FINANCIAL )  
 18 LENDING, JOHN B. SPEAR, an individual, )  
 19 SHAI MOSHE, an individual, GATEWAY )  
 20 TITLE COMPANY, QUALITY LOAN )  
 21 SERVICES, Trustee and DOES 1-100, inclusive, )  
 22 Defendants. )  
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**REPLY MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT OF  
 MOTION BY DEFENDANT GATEWAY  
 TITLE COMPANY TO DISMISS  
 PLAINTIFF'S VERIFIED COMPLAINT  
 PURSUANT TO FEDERAL RULES OF  
 CIVIL PROCEDURE, RULE 12(b)(6)**

Date: September 10, 2007  
 Time: 2:00 p.m.  
 Room: 15  
 Judge: Hon. Marilyn H. Patel

## I. INTRODUCTION

Even under a liberal construction of the pleadings, Plaintiff failed to state a claim upon which relief can be granted under any of the causes of action alleged in the Complaint. According to Plaintiff's opposition papers, the basis of Plaintiff's allegations against Defendant Gateway Title Company under each of the causes of action is that Gateway failed to provide Plaintiff with the disclosures required under the Truth in Lending Act and the corresponding regulations that implement TILA commonly known as Regulation Z (collectively referred to as "TILA"), and the Real Estate Settlement and Procedures Act ("RESPA"). The allegation of failure to provide disclosures is somewhat enlightening since the Complaint contains no such allegations against Gateway in any of the nine causes of action and no facts concerning Gateway that could support a claim against Gateway.

As set forth in detail below, even the allegation that Gateway failed to provide proper disclosures is insufficient to state a claim against Gateway for violations of TILA, violations of RESPA, fraud and deceit, elder abuse, breach of fiduciary duty, breach of contract, recessionary damages and restitution, unfair business practices, or negligence. Accordingly, the Court is warranted in granting Gateway's motion to dismiss.

## 1. TILA

Plaintiff failed to state a claim under TILA because Plaintiff failed to meet its burden to show the threshold requirement under TILA that Gateway is a creditor that engages in consumer credit transactions. Gateway is not a creditor since it does not regularly extend credit and is not a person to whom debt is payable. Gateway is a title company which provides escrow services to people engaging in loan transactions. Plaintiff's opposition papers make the unsupported and incorrect allegation that TILA governs Gateway as the lender's agent. However, case law is clear that to establish a claim under TILA, the plaintiff must show that the defendant is a creditor within the meaning of TILA. *Redic v. Gary H. Watts Realty Co.* (1985) 762.F.2d 1181, 1184-1185. Here, Plaintiff cannot establish that Gateway is subject to TILA.

In an attempt to support its claim against Gateway for violations of TILA, Plaintiff provided in Exhibit A two pages from the *lender's* escrow instructions to Gateway. Gateway objects to the

1 exhibit since it contains evidence not set forth in the Complaint. In addition, the exhibit is  
 2 unauthenticated, it is an incomplete copy of the escrow instructions, and it could be mistaken as  
 3 Plaintiff's escrow instructions since the footer which states "LENDER'S INSTRUCTIONS TO  
 4 CLOSING AGENT" and "NCMC Closing Instructions" is cut off from the exhibit.<sup>1</sup>

5 By referencing the lender's escrow instructions, Plaintiff attempts to shift the lender's  
 6 responsibility for providing disclosures under TILA to Gateway. However, the lender, as the creditor  
 7 under TILA, has the responsibility to provide the statutory disclosures even if it instructs the escrow  
 8 holder to provide courtesy copies of the disclosures containing the borrower's signature to the  
 9 borrower at close of escrow. The lender, not Gateway, is governed by TILA and remains obligated to  
 10 provide the required disclosures.

11 As a result, the Complaint contains no allegations against Gateway sufficient to state a claim  
 12 for violations of TILA.

13 **2. RESPA**

14 The allegations against Gateway for violations of RESPA contain no facts to indicate how  
 15 Gateway violated any provisions of RESPA in handling the escrow for Plaintiff's loan. The  
 16 Complaint does not indicate what written disclosures were required and allegedly not provided by  
 17 Gateway, what alleged "kickbacks and unearned fees" Gateway earned or how it collected the  
 18 claimed prohibited charges.

19 Even the allegations in Plaintiff's opposition to this motion (but not the Complaint) are  
 20 vague: that defendants failed to provide disclosures "regarding settlement and other charges and fees  
 21 connected to the making of Plaintiff's home loan and charged fees not reasonably related to the  
 22 services provided...." Again, even in the opposition Plaintiff fails to identify the disclosures that were  
 23 required and any fees that were allegedly not reasonably related to the services provided by Gateway.

24 For these reasons, Plaintiff's Complaint fails to state a claim against Gateway for violations of  
 25 RESPA.

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 28 <sup>1</sup> For the Court's reference, a complete copy of the three-page Lender's Instructions to Closing Agent is attached  
 to the supplemental declaration of Helen V. Powers as Exhibit A.

1                   **3. Fraud**

2                   The fraud claim in the Complaint consists of general allegations against the parties who made  
 3 the loan to Plaintiff, but contain nothing about Gateway's conduct as escrow holder. To state a claim  
 4 for fraud, Plaintiff is required to identify the circumstances constituting fraud, but fails to do that  
 5 here.

6                   Plaintiff's opposition to this motion indicates that the fraud claim against Gateway is based on  
 7 Gateway's alleged failure to provide disclosures to Plaintiff. Even if that allegation can somehow be  
 8 construed from the Complaint, there are still no allegations of any fraudulent conduct by Gateway.  
 9 Since Gateway is not a creditor it was not required to provide the statutory disclosures required of a  
 10 lender under TILA. As to RESPA, even if Plaintiff were referring to a HUD-1 settlement statement,  
 11 such document is provided to a borrower *after* the loan closes and thus could not be a document  
 12 Plaintiff would rely on in her decision to take a loan.

13                  Without specific allegations of fraudulent conduct by Gateway in carrying out its escrow  
 14 duties, Plaintiff cannot establish a claim for fraud against Gateway.

15                   **4. Elder Abuse**

16                  The elder abuse claim lacks any kind of allegation that Gateway has taken, secreted,  
 17 appropriated or retained Plaintiff's real property or any of Plaintiff's money to a wrongful use or with  
 18 intent to defraud as required under the elder abuse statute, Welfare & Institutions Code §15610.30.  
 19 The essence of Plaintiff's elder abuse claim is that certain defendants gained Plaintiff's trust and then  
 20 fraudulently induced her into a detrimental loan. Again, the allegations are focused on other  
 21 defendants' conduct in getting Plaintiff to take the loan. There are no allegations of how Gateway as  
 22 the escrow holder was part of this alleged scheme to defraud Plaintiff.

23                  Even the vague statement in the opposition papers that Gateway "concealed disclosures" does  
 24 not assist in Plaintiff's attempt to state a claim for elder abuse against Gateway because there are no  
 25 facts to support the allegation. Without specific allegations of elder abuse as required under the  
 26 Welfare and Institutions Code, or facts to support such a claim, Plaintiff has failed to state a claim  
 27 against Gateway for elder abuse.

28                  The *Negrete* case is not helpful to Plaintiff in establishing a case of elder abuse. In *Negrete*,

1 the plaintiff made specific allegations of a taking including that the defendants  
 2 “fraudulently acquired millions of dollars by engaging in a ‘churning’ scheme,  
 3 specifically, ‘using deceptive practices to deplete the accumulated cash value from  
 4 existing life insurance policy or annuity (either by its surrender or, in the case of a life  
 5 insurance policy, borrowing against the policy’s cash value), or the sale of other assets  
 6 (such as mutual funds) and to apply that money to purchase of a new F&G deferred  
 7 annuity.’” *Negret v. Fidelity and Guarantee Life Insurance Co.* (2006) 444 F.Supp.2d  
 8 998, 1002.

9 Given these specific and detailed allegations, the court was justified in finding that the plaintiff’s  
 10 allegations were sufficient to state a claim for wrongful “taking” under the elder abuse statute. In the  
 11 instant case, Plaintiff made no allegations that Gateway engaged or assisted in a wrongful taking to  
 12 state a claim for elder abuse. Accordingly, the cause of action for elder abuse is subject to dismissal.

13 **5. Breach of Fiduciary Duty**

14 To plead a claim for breach of fiduciary duty, Plaintiff must allege the existence of a fiduciary  
 15 relationship giving rise to a fiduciary duty. *Negrete v. Fidelity and Guarantee Life Insurance Co.*  
 16 (2006) 444 F.Supp.2d 998, 1003; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101. Here, Plaintiff  
 17 cannot fulfill that requirement because an escrow agent is not a fiduciary in the general sense. *Lee v.*  
 18 *Title Insurance and Trust Company* (1968) 264 Cal.App.2d 160, 162-163; *Blackburn v. McCoy*  
 19 (1934) 1 Cal.App.2d 648, 654-655. An escrow agent is a limited agent and the limited agency  
 20 relationship is defined by the escrow instructions. *Id.* Interestingly, Plaintiff cited *Blackburn v.*  
 21 *McCoy* in its attempt to establish that an escrow agent has a fiduciary duty in the general agency  
 22 sense. However, *Blackburn* upholds the theory of limited agency and that the escrow instructions  
 23 constitute the full measure of the obligation owed by the escrow holder. *Axel*, also cited by Plaintiff,  
 24 confirms that the escrow agent’s duty is limited to carrying out the escrow instructions. *Axel v.*  
 25 *Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 8.

26 As with Plaintiff’s other claims, Plaintiff’s allegations for breach of fiduciary duty focus on  
 27 the lender’s actions in making the loan to Plaintiff. As an aside, even the lender-borrower  
 28 relationship is not fiduciary in nature. *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231

1 Cal.App.3d 1089, 1093, fn1.<sup>2</sup>

2 Plaintiff did not and cannot allege the existence of a general fiduciary relationship between  
 3 Plaintiff and Gateway. In addition, Plaintiff did not allege that Gateway failed to follow Plaintiff's  
 4 escrow instructions. Again, Plaintiff makes this claim based on Gateway's alleged failure to deliver  
 5 TILA and RESPA documents to Plaintiff. As established above, it was the lender's duty to deliver  
 6 disclosure documents under TILA and Plaintiff failed to make any specific allegations regarding  
 7 RESPA documents.

8 For these reasons, the breach of fiduciary duty claim is subject to dismissal.

9 **6. Breach of Contract**

10 Plaintiff failed to identify any of Plaintiff's escrow instructions that Gateway did not follow.  
 11 Even if, *arguendo*, Gateway did not provide Plaintiff with an additional copy of the signed  
 12 disclosures as instructed by the lender, not only was this the *lender's* instruction, but it was also a  
 13 ministerial act and did not replace the lender's statutory duty to provide the disclosures. Since  
 14 Plaintiff's escrow instructions to Gateway define the contract between Gateway and Plaintiff, Plaintiff  
 15 has failed to identify any of Plaintiff's instructions that Gateway failed to follow. Without alleging  
 16 any breach of the escrow instructions, Plaintiff fails to state a claim for breach of contract. In  
 17 addition, without a breach of contract, there is no basis for a rescission as claimed in the seventh  
 18 cause of action.

19 **7. Unfair Business Practices**

20 Under the claim for unfair business practices, Plaintiff identifies activities by the broker and  
 21 the lender in making the loan which could constitute unfair business practices. However, the  
 22 allegations in no way identify any specific conduct by Gateway. If the cause of action is meant to be  
 23 derived from the other causes of action against Gateway, those claims fail for the reasons stated.  
 24 Without specific allegations against Gateway as to alleged unfair business practices, Plaintiff fails to

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 27 <sup>2</sup>As a matter of law, a lender owes no duty of care to a borrower when the lender is acting in its conventional role  
 28 as a mere lender of money. *Nymark*, 231 Cal.App.3d 1089, 1096. The court in *Nymark* noted that the relationship  
 between a lender and its borrower-client is not fiduciary in nature. *Id.* at 1093, fn.1 "A commercial lender is entitled to  
 pursue its own economic interests in a loan transaction." *Id.*

1 state a claim against Gateway.

2 **8. Negligence**

3 The negligence claim concerns the lender's and broker's actions in processing the loan  
4 application, advising Plaintiff on financial matters, distributing Plaintiff's loan proceeds, and dealing  
5 with the foreclosure of Plaintiff's home. These allegations have nothing to do with Gateway. Again,  
6 Gateway's duty is defined by the escrow instructions, and Plaintiff failed to identify any instruction  
7 not followed by Gateway. As a result, Plaintiff cannot establish a cause of action for negligence  
8 against Gateway.

9 **CONCLUSION**

10 For all of the reasons set forth above, none of the nine causes of action contain allegations  
11 sufficient to support a claim against Gateway. As a result, the Court is warranted in granting  
12 Gateway's motion to dismiss.

13 Respectfully submitted,

14 Dated: August 27, 2007

15 BARDELLINI, STRAW, CAVIN & BUPP, LLP

16 By: /s/ Helen V. Powers  
17 John F. Cavin  
18 Helen V. Powers  
19 Attorneys for Defendant  
20 GATEWAY TITLE COMPANY

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